UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GERARD P. DUNN, individually and o/b/o THOMAS M. DUNN,	)	
Plaintiff	)	
v.	)	***Docket No. 99-117-P-C***
ARIANE K. COMETA, M.D.,	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

Defendant Ariane K. Cometa moves pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss plaintiff Gerard P. Dunn's seven-count complaint against her on the basis of lack of subject-matter jurisdiction — specifically, the so-called "domestic-relations exception" to the jurisdiction of federal courts. Defendant's Motion To Dismiss for Lack of Subject Matter Jurisdiction ("Defendant's Motion") (Docket No. 7).[1] For the reasons that follow, I recommend that the motion be granted.

I. Applicable Legal Standards

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden

[1]The defendant alternatively asks the court to abstain from exercising its jurisdiction and, in her reply brief, suggests that certain claims may be precluded on the basis of *res judicata*. Defendant's Motion at 6; Defendant's Reply Memorandum on Motion To Dismiss ("Defendant's Reply") (Docket No. 11) at 3-4. To the extent the defendant seeks dismissal based on a *res judicata* theory, the argument comes too late. Issues raised for the first time in reply memoranda will not be considered by this court. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991).

of demonstrating that the court has jurisdiction. *Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996). For purposes of a motion to dismiss under Rule 12(b)(1), the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see also Aversa*, 99 F.3d at 1210; *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

II. Background

Ariane Cometa married Thomas Dunn on June 17, 1989 in Montclair, New Jersey. Divorce Judgment, *Cometa v. Dunn*, Docket No. BID-97-FM-144 (Me. Dist. Ct. Dec. 16, 1998) ("Divorce Judgment"), attached as Exh. B to Defendant's Motion, at 1. Cometa at the time was enrolled at Eastern Virginia Medical School. *Id.* She graduated in 1992 and commenced a three-year residency program at Maine Medical Center in Portland, Maine. *Id.*

On September 6, 1994 Thomas Dunn suffered a catastrophic brain injury that rendered him totally disabled. *Id*. at 2; Plaintiff Gerard P. Dunn Answers Interrogatories Propounded by Defendant Ariane K. Cometa, M.D. ("Plaintiff's Interrog. Answers"), attached as Exh. A to Defendant's Motion, ¶ 1. Thomas Dunn was semi-comatose for the first six months after his injury, was unable to speak for the first eighteen months and has since suffered continuing short-term memory problems. Plaintiff's Interrog. Answers ¶ 1. Between September 1994 and June 1997 he was treated and resided in a variety of critical-care, custodial and rehabilitative facilities in the state of Maine. Complaint (Docket No. 1) ¶ 7; Answer to Complaint ("Answer") (Docket No. 2) ¶ 7. Since June 1997 he has lived with his father, plaintiff Gerard Dunn, in Georgia. Complaint ¶ 7;

Defendant's Motion at 3.

In January 1995 Cometa began an extramarital relationship. Plaintiff's Interrog. Answers ¶ 2. She possessed the sole authority to manage Thomas Dunn's financial and other affairs until Gerard Dunn was named his conservator by order of the Probate Court of York County, Maine dated August 19, 1997. *Id.* ¶ 1; Affidavit of Gerard P. Dunn in Support of Motion To Re-open Discovery, attached to Defendant's Motion To Re-open Discovery ("Motion To Reopen"), *Cometa v. Dunn*, Docket No. BID-97-FM-144 (Me. Dist. Ct.), attached as Exh. A to Defendant's Reply, ¶ 1. In April 1997 Cometa filed for a divorce. Complaint ¶ 5; Answer ¶ 5. During the course of divorce proceedings Thomas Dunn's counsel moved to reopen discovery, asserting his need to explore possible economic wrongdoing that included Cometa's alleged surreptitious transfer of all of the parties' marital and non-marital assets to herself and her decision to permit his private health insurance to lapse. Motion To Reopen at 1-2. This request was granted in part. Endorsement to *id.*

In its divorce judgment dated December 16, 1998 the Maine District Court noted in the context of discussing Thomas Dunn's request for an award of attorney fees:

> The new discovery requested by Mr. Dunn's second counsel after discovery was closed was based on allegations of economic wrongdoing and fraud by Dr. Cometa. Yet, Mr. Dunn conceded that economic misconduct was not going to be an issue at the beginning of the trial. Judging from the evidence I heard at trial, Mr. Dunn decided not to pursue economic misconduct because there was not a shred of evidence to support a finding of economic misconduct or fraud. Therefore this discovery was totally unnecessary.

Divorce Judgment at 6.

Dunn's counsel protests this characterization, asserting that "in order to avoid any suggestion of *res judicata* — , Mr. Dunn surgically separated from the divorce any evidence pertaining to his causes of action herein." Plaintiff's Opposition to Defendant's Motion To Dismiss and

Accompanying Memorandum of Points and Authorities (Docket No. 9) at 2. Dunn's counsel points out that he explained to the divorce court:

> **It should be noted that while the [sic] Dr. Cometa at one point during Mr. Dunn's hospitalization after his AVM caused his private insurance benefits to be terminated and him to be placed on Medicaid, Mr. Dunn is specifically <u>not</u> asking the Court to address the fact that Dr. Cometa thereby wasted marital assets (*e.g.*, Mr. Dunn's private insurance benefits). Indeed, Mr. Dunn is directing that that wrongdoing not constitute any basis for alimony. Any breach of fiduciary responsibilities, interference with beneficial contractual relationships, fraud, intentional or negligent infliction of emotional distress, malice or other cause of action occasioned by same shall be addressed in a separate action.**

Memorandum of Points and Authorities in Support of Proposed Divorce Judgment (Defendant's Version), *Cometa v. Dunn*, Docket No. BID-97-FM-144 (Me. Dist. Ct.), attached as Exh. B to Affidavit of David J. Van Dyke Esq. in Support of Opposition to Motion To Dismiss (Docket No. 10), at [8]-[9] (emphasis in original).

On April 12, 1999 Gerard Dunn filed the instant suit asserting the following causes of action: (i) breach of fiduciary obligations and responsibilities, based on the alleged "warehous[ing]" of Thomas Dunn at a custodial facility for a year; permitting his private health insurance to lapse and wrongfully committing him to Medicaid and/or SSI; wrongfully transferring property; and wrongfully barring the timely involvement in his affairs by Gerard Dunn (Count I); (ii) negligence and waste, based on the loss of Thomas Dunn's private health insurance (Count II); (iii) intentional infliction of emotional distress, based on the "warehousing" of Thomas Dunn in alleged furtherance of Cometa's desire to maintain an extramarital relationship (Count III); (iv) negligent infliction of emotional distress, based on unspecified acts and omissions of Cometa that were negligent and violated her duty of due care toward her husband (Count IV); (v) malice, based on unspecified

outrageous and malicious acts of Cometa toward her husband (Count V); (vi), breach of contract/unjust enrichment, based on a promise allegedly made by Cometa to Gerard Dunn that she would reimburse him for the renovation of space at Dunn's Georgia home into living quarters for Thomas Dunn and for the cost of her ex-husband's transport to Georgia (Count VI); and (vii) unjust enrichment/care and maintenance, seeking reimbursement of costs incurred by Gerard Dunn in caring for Thomas Dunn between June 1997 and the date of the Dunn-Cometa divorce (Count VII). Complaint ¶¶ 8-43.

III. Analysis

The so-called domestic-relations exception "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). *See also Sutter v. Pitts*, 639 F.2d 842, 843 (1st Cir. 1981) ("It is firmly established that the federal courts do not have diversity jurisdiction to grant divorces, determine alimony and support obligations, or resolve the conflicting claims of divorced parents to the custody of their children.").

The First Circuit has stated that, even as to cases that do not fit comfortably within the confines of the narrow domestic-relations exception, "federal courts should abstain from adjudicating claims that are closely related to" that exception. *Id.* at 843. The ongoing vitality of this dictum arguably is called into question by *Ankenbrandt*, in which the Supreme Court admonished lower federal courts to abstain sparingly from exercising jurisdiction over causes of action with domestic-relations overtones that are not directly subject to the exception. *Ankenbrandt*, 504 U.S. at 704-06; *see also DeMauro v. DeMauro*, 115 F.3d 94, 99 (1st Cir. 1997) (acknowledging that *Ankenbrandt* had curtailed domestic-relations exception). However, the Supreme Court noted that:

> in certain circumstances, the abstention principles developed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.

Ankenbrandt, 504 U.S. at 705-06 (citation and internal quotation marks omitted).

Cometa contends that the instant claims, particularly those asserted in Counts I through V, either fall squarely within the domestic-relations exception or are of such a nature that this court should abstain from adjudicating them. Defendant's Motion at 6. I agree.

Two of Gerard Dunn's claims, Counts I and II, are encompassed within the domestic-relations exception. Maine law conferred upon Thomas Dunn the right to seek spousal support based in part upon "[e]conomic misconduct by either party resulting in the diminution of marital property or income." 19-A M.R.S.A. § 951(1)(M). *See also Mutual Fire Ins. Co. v. Richardson*, 640 A.2d 205, 208-09 (Me. 1994) ("Fault in general may be irrelevant for the grant of a judgment of divorce, but economic misconduct is statutorily relevant to an award of alimony.").

In the context of his divorce proceeding Thomas Dunn was indeed afforded an opportunity to conduct discovery as to Cometa's alleged economic wrongdoing, including the asserted property transfers and health-insurance lapse that form the core of Counts I and II.[2] That Dunn's counsel made a strategic decision not to press these points in the divorce context does not alter their character. Gerard Dunn, acting on behalf of his son, essentially asks this court to perform a core domestic-relations function: the allocation (or, more precisely, reallocation) of marital property to

[2]To the extent that Count I reaches beyond pure economic misconduct — for example, in accusing Cometa of warehousing Thomas Dunn — and is thus not subject to the narrow domestic-relations exception, the court should nonetheless abstain from hearing those portions for the reasons discussed below in the context of my abstention analysis.

which his son could be entitled, if at all, only by virtue of the marital relationship. *See DeMauro*, 115 F.3d at 99 (despite *Ankenbrandt's* limitations on domestic-relations exception, clear that allocation of property incident to divorce is longstanding function governed by state law); *Gonzalez Canevero v. Rexach*, 793 F.2d 417, 418 (1st Cir. 1986) (lower court did not err in determining that it lacked subject-matter jurisdiction to hear case in which ex-wife sought assets of corporation controlled by ex-husband that were not distributed in previous divorce action; inasmuch as appeared, ex-wife sought funds based on status as ex-wife, not as shareholder in corporation).

Counts III through V of the Complaint, which allege intentional infliction of emotional distress, negligent infliction of emotional distress and malice, do not fall within the core domestic-relations exception. Cometa nonetheless makes a compelling case for abstention on the ground that these counts implicate murky, cutting-edge areas of Maine public policy.[3] *See* Defendant's Motion at 6-7. The Law Court in 1993 ruled that interspousal immunity did not bar a cause of action for intentional infliction of emotional distress in a case in which the plaintiff alleged that her ex-husband had subjected her to physical violence accompanied by verbal abuse. *Henriksen v. Cameron*, 622 A.2d 1135, 1138 (Me. 1993). Inasmuch as appears, the Law Court has not had occasion to decide whether such immunity would come into play either in the absence of physical violence or in the context of causes of action for negligent infliction of emotional distress or malice arising from the former marital relationship of ex-spouses. As the Law Court observed in *Henriksen*, delicate considerations are at stake: "A second policy concern is the threat of excessive and frivolous

[3]Counts IV and V are in addition "closely related" to the alleged wrongful property transfers and health-insurance lapse at issue in Counts I and II, as the plaintiff makes clear in his answers to interrogatories. Plaintiff's Interrog. Answers ¶¶ 12-14. However, I do not rest my decision on this ground in view of the doubt that *Ankenbrandt* casts on previous First Circuit pronouncements concerning the reach of abstention in domestic-relations cases.

litigation intruding into the marital lives of the parties. Admittedly, this is of particular concern after a divorce since the events leading to most divorces involve some level of emotional distress and the likelihood of vindictive post-divorce litigation may be especially high." *Id.* at 1139. At bottom, this is precisely the type of case that "presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Ankenbrandt*, 504 U.S. at 705-06 (citation and internal quotation marks omitted). Abstention as to Counts III through V therefore is warranted.

This leaves Counts VI and VII, in which Gerard Dunn seeks recovery on contract and unjust-enrichment theories for expenses incurred in caring for his son. These are the ordinary stuff of which diversity jurisdiction is made; however, the aggregate amount in controversy, $41,177.36, falls below that necessary to sustain such jurisdiction. Complaint ¶¶ 34-43; 28 U.S.C. § 1332(a) (matter in controversy must exceed sum or value of $75,000, exclusive of costs and interest).

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 1st day of November, 1999.

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David M. Cohen
United States Magistrate Judge